**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v**

**ZAHRA GILAK,**

**Defendant.**
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**No CR 01-0325 VRW**

**ORDER**

**Defendant Zahra Gilak renews her motion for judgment of acquittal pursuant to FRCrP 29. In the alternative, Gilak moves for for a new trial pursuant to FRCrP 33. For reasons discussed below, Gilak's motions are DENIED.**

**I**

**A**

***Procedural History***

**On August 30, 2001, a grand jury returned an 82-count indictment against Gilak and her co-defendant (and then-spouse) F Thomas Eck III. Eck pleaded guilty to one count of securities**

fraud on December 16, 2003, was sentenced to a prison term of 70 months and is no longer a party to these proceedings.

Prior to the commencement of trial, Gilak and the government stipulated to proceed on a modified 51-count indictment, which charged Gilak with one count of conspiracy to commit securities fraud in violation of 18 USC § 371 (count 1), one count of securities fraud in violation of 15 USC §§ 78j(b) and 78ff (count 2), one count of conspiracy to commit money laundering in violation of 18 USC § 1956(h) (count 3), 42 counts of money laundering in violation of 18 USC § 1956(a)(1)(B)(i) (counts 4 through 45) and six counts of conducting financial transactions to promote securities fraud in violation of 18 USC § 1956(a)(1)(A)(i) (counts 46 through 51). Doc #206, Ex B (Indictment). Counts 2 and 4 through 51 also charged Gilak as an aider and abettor in violation of 18 USC § 2.

Trial commenced on February 6, 2006. On February 21, 2006, Gilak moved for judgment of acquittal pursuant to FRCrP 29(a) and the court dismissed counts 3 through 45 the following day. The remaining counts were submitted to the jury on February 23, 2006. After deliberating for several days over the testimony of approximately 20 witnesses and hundreds of exhibits, on February 28, 2006, the jury returned guilty verdicts on counts 2 and 46 through 50. The jury acquitted on count 51 and was unable to reach a unanimous verdict on count 1. Gilak timely moved to set aside the verdict.

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**B**

***The Indictment***

**The indictment alleged a scheme to defraud whereby Gilak, Eck and "others" manipulated the share prices of three publicly traded entities: M & A West, Inc (MAWI), VirtualLender.com (VLDC) and Digital Bridge, Inc (DGBI). The indictment labeled the scheme as a "pump and dump" scheme that Eck, Gilak and others carried out by (1) gaining concealed control over most of the outstanding shares of each entity, (2) arranging to sell their shares to the investing public once demand was generated and (3) distributing proceeds of the sales to themselves, family members and third parties. Indictment ¶4.**

**More specifically, the indictment postulates that the alleged scheme was carried out through the steps alleged in paragraphs 9 through 16:**

**(1) "Eck and others" engaged "shell brokers" to identify inactive public corporations that were available for purchase. Id ¶9.**

**(2) "Eck and others" arranged "reverse mergers" whereby private corporations under their control purchased the inactive shell corporations, creating new entities (MAWI, VLDC and DGBI) capable of issuing stock to the public. Id ¶10.**

**(3) "Eck, Gilak, and others" arranged for the new entities to distribute stock to nominee entities under their control (as well as friends and family members). Id ¶11.**

**(4) "Eck, Gilak, and others" opened accounts in the names of the nominees at several brokerage firms. Id ¶12.**

(5) Investor demand for MAWI, VLDC and DGBI stock was generated in two ways:

(a) Unspecified "members" of the conspiracy engaged in promotional efforts, which "included the false issuance of false and misleading corporate press releases, false and misleading Internet postings, stock and cash payoffs to professional stock promoters, and payoffs to 'securities analysts' in return for favorable research reports recommending the stocks to investors." Id ¶13.

(b) "Gilak and others" orchestrated trading activity in the nominee brokerage accounts, giving the misleading appearance of bona fide demand. Id ¶14.

(6) Finally, "Eck, Gilak, and others" capitalized on the resulting investor demand by selling nominees' shares and directing that the more than $15.4 million in sale proceeds be transferred to themselves, their family members and other individuals entities. Id ¶¶15-16.

As can be seen, the indictment did not specifically link Gilak to the "promotional efforts" alleged in paragraph 13.

C

*The Jury Instructions*

The jury was not provided with a copy of the indictment. In instructing the jury on count 2 (securities fraud), the court described the alleged scheme to defraud as follows:

> The indictment alleges that defendant engaged in a particular scheme to defraud. Specifically, the government alleges that defendant and others

> manipulated the stock of [MAWI, VLDC and DGBI] by engaging in a so-called "pump and dump" scheme. The government alleges that defendant and others gained control over most of the outstanding shares of these entities through so-called "reverse mergers," concealed that control, generated artificial investor demand for that stock by engaging in misleading promotional efforts and orchestrating trading activity in nominee brokerage accounts and then arranged to sell their shares to the investing public.

Doc #213 (Final Jury Instructions) at 11.

The court then instructed the jury that in order to prove Gilak's guilt, the government had to prove that Gilak employed the particular scheme to defraud described above. Id. The remainder of the court's instructions on the substance of securities fraud essentially tracked the Ninth Circuit model instructions. The instruction on aider and abettor liability was no exception:

> To prove defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:
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> 1. Securities fraud was committed by someone;
> 2. Defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of securities fraud; and
> 3. Defendant acted before the crime was completed.
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> It is not enough that defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that defendant acted with the knowledge and intention of helping that person commit securities fraud.

Id at 13.

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**II**

***Legal Standards***

**In deciding a motion for judgment of acquittal, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v Virginia, 443 US 307, 319 (1979). A verdict should be set aside if "there are not sufficient probative facts from which a factfinder, applying the beyond a reasonable doubt standard, could rationally choose the hypothesis that supports a finding of guilt rather than the hypotheses that are consistent with innocence." United States v Lopez-Alvarez, 970 F2d 583, 589 (9th Cir 1992).**

**"A district court's power to grant a motion for new trial is much broader than its power to grant a motion for judgment of acquittal." United States v A Lanoy Alston, DMD, PC, 974 F2d 1206, 1211 (9th Cir 1992). "The court is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses." United States v Kellington, 217 F3d 1084, 1097 (9th Cir 2000). "'If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.'" Alston, 974 F2d at 1211-12 (quoting United States v Lincoln, 630 F2d 1313, 1319 (8th Cir 1980)).**

**III**

***Rule 29 Motion***

**Gilak's Rule 29 motion focuses upon the sufficiency of the evidence with regard to (1) the scheme to defraud alleged in the indictment and (2) her knowledge of the alleged scheme. The court addresses Gilak's arguments in turn.**

**A**

**According to Gilak, the indictment alleged a "pump and dump" scheme yet the evidence demonstrated that such a scheme did not exist. As an initial matter, Gilak calls the court's attention to two Second Circuit opinions for their descriptions of a pump and dump scheme. See United States v Salmonese, 352 F3d 608, 612 (2d Cir 2003) (describing the alleged conspiracy as "a variation on the classic 'pump and dump' scheme —— whereby persons holding certain securities fraudulently inflate their price (the 'pump') in order to sell at an artificial profit (the 'dump')"); United States v Downing, 297 F3d 52, 55 (2d Cir 2002) ("'Pump and dump,' according to the government, denotes a stock-market manipulation scheme in which the schemers first artificially inflate, or 'pump,' the price of a stock by bribing stock promoters to sell it, and then 'dump' the stock once the price becomes sufficiently high." (alterations and quotations omitted)).**

**The court need not decide whether the indictment's invocation of the descriptive phrase "pump and dump," like a talisman, bound the government to prove what Gilak calls a "classic" pump and dump scheme or some variation thereof, for Gilak concedes that the particular scheme in the indictment qualifies as**

a pump and dump scheme. The only relevant question, then, is whether the government proved the scheme alleged in the indictment. To answer that question, the court turns to the evidence.

1

After learning of the money to be made in the stock promotion business, Scott Kelly abandoned his career as a stock broker and decided to start MAWI. Unfamiliar with the mechanics of incorporation, Kelly contacted Eck, the only corporate and securities lawyer he knew. Kelly and Eck met sometime in 1997. Gilak, who had previously worked with Eck in setting up corporations, also attended this initial meeting. Tr (Vol 3 excerpt) at 5-10. Thus began the relationships at the heart of the alleged scheme.

MAWI was incorporated on June 3, 1997. GX 269 at 1146. Kelly and Gilak were MAWI's initial directors and officers, Kelly serving as chairman and Gilak as secretary. Id at 1158, 1164. Kelly received a 75% interest in MAWI; the remaining 25% went to Administrative Systems Corporation as compensation for Eck and Gilak's services. Tr (Vol 3 excerpt) at 14-16. Although Kelly understood that Gilak and Eck jointly owned and controlled Administrative Systems, id at 16, whether and to what extent Gilak had a beneficial interest in Administrative Systems was a matter of dispute at trial. In addition to stock promotion, MAWI was an "internet incubator." Id at 4.

Not long thereafter, Kelly saw opportunity in the online mortgage business and, toward that end (and again with the assistance of Eck and Gilak), founded M & A West Financial. Id at

**20. After it became apparent that M & A West Financial required more capital than MAWI could supply, Kelly, Eck and Gilak considered the private equity route. Tellingly, perhaps, this strategy bore no fruit because the three "didn't get too far" with a business plan. Id at 23.**

**Kelly learned of the mechanics of the "reverse merger" process on a conference call with Eck, Gilak and Stan Medley. Id at 25. By reverse merging with an inactive shell corporation, M & A West Financial could "go public" without jumping the regulatory hurdles that accompany public stock offerings. One consequence of a reverse merger was that although much of the stock would be subject to trading restrictions, some of the stock would be eligible for trading on the Over-the-Counter Bulletin Board (OTCBB). Kelly sought to minimize price volatility of the free-trading stock, which required maximizing the volume of stock available for trading (frequently referred to at trial as the "float"). At the same time, however, Kelly feared the possibility that, in the wrong hands, free-trading stock would be sold en masse, thereby depressing the price. Kelly thus sought to maximize the size of —— while maintaining control over —— the float.**

**Here, Kelly faced a dilemma. On the one hand, Kelly's "primary concern was that [he] didn't want the free-trading stock to be in the hands of people that would immediately dump the stock on the market," thereby depressing the price. Id at 33. On the other hand, free-trading shares placed in the hands of Eck, Gilak or himself, would become restricted through the operation of SEC Rule 144, 17 CFR § 230.144, due to their status as control persons of MAWI and/or M & A West Financial.**

**Medley initially proposed a solution whereby free-trading shares would be distributed to nominee individuals and entities to give the appearance that the shares were not owned by a control person, even though as a practical matter, they were held for the benefit of a control person. Tr (Vol 3 excerpt) at 34. Conveniently, Eck and Gilak had several companies that could serve as nominees. Id.**

**Medley located a shell corporation that was acquired by M & A West Financial, and the reverse merger was eventually consummated in February 1999, the resulting entity known as VirtualLender.com (VLDC). GX 247. In addition to MAWI and the owners of the shell, unrestricted shares of VLDC were distributed to Global Capital Concepts, Inc (GCC) and the Neuman Company, two entities controlled by Gilak. GX 251; Tr (Vol 3 excerpt) at 42, 49. Free-trading shares were also distributed to relatives of Kelly and Eck. GX 251; Tr (Vol 3 excerpt) at 45-46, 48-50. Kelly testified that he, Eck and Gilak "had an understanding that [they] weren't going to dump [free-trading shares] on the market" but rather "sell them at an appropriate time, so we wouldn't have a negative effect on the stock [price]." Tr (Vol 3 excerpt) at 43.**

**Similar series arrangements were made in connection with MAWI and DGBI.**

**2**

**The heart of Gilak's argument is Scott Kelly's testimony that he distributed free-trading shares to nominee entities controlled by himself and Gilak (and, to a lesser extent, Eck) to ensure that stock was not dumped on the market. Gilak contends**

that Kelly had two "long-range" goals, neither of which was consistent with the alleged pump and dump scheme: (1) maintaining the price of his companies' securities until his own shares were free of trading restrictions and (2) reinvesting proceeds from the sale of stock by nominees which he controlled. Doc #229 at 15. Under these circumstances, whatever scheme may have existed, it was not, according to Gilak, a pump and dump scheme. The court disagrees.

The court first observes that a scheme to keep a stock price inflated until trading restrictions expire could reasonably be characterized as a pump and dump scheme. Pumping may be more prolonged and dumping deferred longer than the relatively short period envisioned in the paradigm example of a pump and dump scheme (if there is such a paradigm), but the key elements —— price manipulation followed by sales that reap artificial profits —— remain.

The indictment does not allege deferred dumping of previously restricted stock. Rather, the indictment alleges dumping in the form of sales of free-trading shares by nominees. Indictment ¶16. Notwithstanding Scott Kelly's statements to the contrary, the evidence suggested that he had short-term interests that benefitted from the sale of free-trading stock by nominees. Consider the following example:

In response to an April 12, 1999, press release, the price of VLDC jumped from $4-$6/share to $25-$29/share almost immediately. GX 264; Tr (Vol 3 excerpt) at 59-60. Kelly testified that this exponential price increase could be attributed in part to the fact that he, Eck and Gilak were holding on to shares they

controlled through nominees in order to constrict supply. Id at 61. At this point, a trader at North Coast Securities, which had been making a market in VLDC, requested that Kelly cover the trader's short position in 30,000 shares of VLDC, which was potentially devastating given the exponential price increase. Id at 62. Kelly testified that he accommodated the trader by selling VLDC shares out of the George Levitt account at North Coast Securities, which yielded a profit of approximately $2.2 million. Id at 63. See also GX 516 (indicating that between April 15 and April 19, 1999, 149,700 shares of VLDC were sold from the George Levitt account at North Coast Securities for credits totaling $2,240,126.30).

Had accommodation been the sole purpose of this transaction, the jury very well may have wondered why Kelly sold almost 150,000 shares of VLDC during that timeframe. See GX 516. The fact that most of the $2.2 million in proceeds from these sales might have been put back into MAWI (as Kelly testified) is consistent with the indictment. See Indictment ¶16 ("[F]ollowing sales of stock by the Nominees, Eck, Gilak, and others directed that sale proceeds be transferred to themselves, their family members, and various other entities and individuals." (emphasis added)).

In sum, one thing Scott Kelly never stated in the course of his lengthy testimony was that he truly was "in it for the long haul" —— that he sought to build the intrinsic value of the corporations. Rather, his testimony made clear that he sought to cash in on a fraudulent scheme to create and maintain artificially high stock prices. And although Kelly's testimony might have been

ambiguous regarding whether he viewed the expiration of trading restrictions as his first opportunity to "cash in," the evidence as a whole suggested that he and/or MAWI were capitalizing on the fraudulent scheme through the sale of free-trading shares by nominees he controlled. Under these circumstances, the jury could have rationally concluded that Scott Kelly was on board with the scheme alleged in the indictment.

The jury's lack of unanimity on count 1 (conspiracy to commit securities fraud) suggests that jurors might not have agreed that Gilak and Kelly saw eye-to-eye on all aspects of the alleged scheme. But this, by itself, does not cast a shadow on the jury's findings on count 2, for "[t]he community of unlawful intent" required for aider and abettor liability "does not rise to the level of agreement" necessary to sustain a charge of unlawful conspiracy. United States v Beck, 615 F2d 441, 449 (9th Cir 1980) (quotation omitted). And in any event, Scott Kelly was not specifically named in the indictment. For purposes of count 2, the question is whether any rational juror could have found beyond a reasonable doubt that Gilak —— not Kelly —— engaged in the particular scheme alleged in the indictment as either a principal or an aider and abettor. The indictment's characterization of that scheme as a pump and dump does not control the matter.

B

Gilak challenges the sufficiency of the evidence regarding her knowledge of the alleged scheme. To convict Gilak as a principal of the alleged scheme, the jury must have found that Gilak participated in the scheme with knowledge of its fraudulent

nature. United States v Price, 623 F2d 587, 591 (9th Cir 1980), overruled on other grounds, United States v De Bright, 730 F2d 1255 (9th Cir 1984). See also Final Jury Instructions at 12 (instructing that "the government must prove beyond a reasonable doubt that the defendant knew that the scheme to defraud was calculated to deceive"). To find Gilak guilty as an aider and abettor, the jury must have found that someone committed securities fraud and that Gilak (1) had the specific intent to facilitate the commission of securities fraud by another, (2) had the requisite intent of securities fraud and (3) assisted or participated in the commission of the underlying substantive offense. United States v Garcia, 400 F3d 816, 818 n 2 (9th Cir 2005) (quoting United States v Delgado, 357 F3d 1061, 1065-66 (9th Cir 2004) (quoting United States v Gaskins, 849 F2d 454, 459 (9th Cir 1988))). The jury was instructed accordingly. See *supra* I(C).

Gilak's argument proceeds along two dimensions. First, she contends that the conviction cannot stand in the absence of evidence that she knew that false statements were being disseminated. Second, Gilak focuses on the lack of evidence regarding her knowledge of the securities laws.

1

The court agrees with Gilak that little, if any, evidence connected her to press releases, financial statements or other promotional efforts entailing affirmative statements that were false or misleading. The only evidence tending to establish such a connection were documents indicating that Gilak's parents were the source of $500,000 that MAWI falsely reported as proceeds from the

sale of assets (specifically, "Pokemon" websites). See GX 271, 296, 324. This was consistent with the indictment, which did not allege that Gilak engaged in the false promotional efforts described in paragraph 13.

The court concludes that the verdict can stand in the absence of evidence regarding Gilak's knowledge of or participation in disseminating false statements for two reasons.

a

First, "the government need not prove that the defendant was aware of every detail of the impending crime, nor that [s]he [was] present at, or personally participate[d] in, committing the substantive crime." United States v Smith, 832 F2d 1167, 1170 (9th Cir 1987) (citations omitted). See also United States v Mehrmanesh, 682 F2d 1303, 1308 (9th Cir 1982), overruled in part on other grounds, United States v Palofox, 764 F2d 558 (9th Cir 1985); United States v Short, 493 F2d 1170, 1172 (9th Cir 1974); Weedin v United States, 380 F2d 657, 660 (9th Cir 1967); Benchwick v United States, 297 F2d 330, 332-33 (9th Cir 1961). Of the aforementioned cases, Short provides a useful counterpoint.

The defendant in Short was an accomplice to a bank robbery committed by one John Seymour. Short drove the getaway car and was charged with armed bank robbery in violation of 18 USC § 2113, which requires that the principal have been armed and have used the weapon to jeopardize the life of a bank teller. Although Seymour used a firearm, "[t]here was no direct evidence that Short knew that Seymour had a gun or that Seymour intended to use it." Short, 493 F2d at 1171. The jury was instructed on an aiding and

abetting theory and during deliberations asked whether Short needed to have known that Seymour had a gun. The district court responded that the jury need not specifically so find so long as it found that (1) Short knew that Seymour would rob the bank and (2) Seymour used the firearm in the manner proscribed by statute. Id at 1172. The jury convicted; the Ninth Circuit reversed.

The panel recognized that, generally, "the prosecution is not required to prove that the aider and abettor was aware of all the details of the planned offense." Id. But the panel focused on the fact that "[a]n essential element of armed bank robbery as charged" was "that the principal was armed and used the weapon to jeopardize the life of the teller. It this conduct that Short must be shown to have aided and abetted." Id. By specifically dispensing with this element, the district court erred.

If false statements such as those alleged in paragraph 13 were a required element of principal liability for the offense with which Gilak was charged in count 2, then the lack of evidence regarding Gilak's knowledge of false statements would be of more consequence. Unsurprisingly, then, Gilak argues (as she did at the charging conference) that a false statement is an essential element of securities fraud. But the statutes and regulations underlying count 2 impose no such requirement. See 15 USC § 78j(b) (prohibiting "any manipulative or deceptive device or contrivance in contravention of [SEC] rules and regulations"); 17 CFR 240.10b-5 (separately denominating devices, schemes and artifices to defraud and false statements and omissions of material fact); 15 USC § 78ff (providing criminal sanctions for willful violations of § 10(b) and Rule 10b-5). See also Santa Fe Industries, Inc v Green, 430 US

462, 477 (1977) ("The term ['manipulation]' as used in § 10(b)] refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity. * * * No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices." (citations omitted)); SEC v Kimmes, 799 F Supp 852, 859 (ND Ill 1992) (stating that § 10(b) of the Securities Exchange Act of 1934 outlaws "any activities that falsely persuade the public that activity in an over-the-counter security is the reflection of a genuine demand instead of a mirage," including "the use of undisclosed nominees"). Cf United States v Reliant Energy Servs, Inc, 420 F Supp 2d 1043, 1058 (ND Cal 2006) (Walker) (declining to hold that fraud or deceit is a required element of a criminal violation of § 9(a)(2) of the Commodity Exchange Act).

b

Second, the indictment does not require the government to have proved that Gilak knew of that false statements such as those described in paragraph 13 were being disseminated. As noted, the indictment does not mention Gilak in paragraph 13 or otherwise specifically link her to the allegations contained in paragraph 13 (that is, apart from the general allegation that she participated in the overall scheme). Even if the indictment did connect Gilak with allegations in paragraph 13, a failure of proof in this regard —— indeed, a failure to prove that the acts alleged in paragraph 14 were committed by anyone —— would not have resulted in an impermissible variance between the charges and proof, for proof of

the allegations in paragraph 14 would have supplied a sufficient *actus reus* upon which to find Gilak guilty as a principal violator. See United States v Miller, 471 US 130, 131 (1985) (holding that the Fifth Amendment right not to be prosecuted except upon indictment by a grand jury is not violated "when a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted based on trial proof that supports only a significantly narrower and more limited, though included, fraudulent scheme").

In this regard, there was substantial evidence that Gilak "orchestrat[ed] trading activity" in nominee accounts she controlled to "ma[k]e it appear that investor demand for a stock existed." Indictment ¶14. Just before the end of May 2000 (the end of MAWI's annual reporting period), Sal Censoprano and Kelly realized that, through mark-to-market accounting, MAWI could report an increase in the market value of its VLDC holdings as unrealized capital gains. Thus, the higher the price for VLDC stock at the end of MAWI's annual reporting period, the higher the earnings MAWI could report. Accordingly, Kelly sought to elevate the trading price of VLDC stock. Tr (Vol 3 excerpt) at 146-47. Kelly and Gilak employed two means toward this end. First, they hired a stock promoter (although it was Kelly who actually found the stock promoter). Id at 148. Second, they began to buy VLDC stock with the hope that increased demand would drive up the price. Id at 149. GCC, the Neuman Company and Gilak's sister Ziba Rahimzadeh purchased tens of thousands of shares of VLDC stock at the end of May 2000. GX 315, 506, 522.

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**Finally, because the lack of evidence regarding Gilak's knowledge of the false promotional efforts in paragraph 13 does not justify disturbing the jury's verdict, *a fortiori*, the lack of evidence that Gilak either herself disseminated or directed others to disseminate false promotional statements is of no moment.**

**2**

**"Most critically," according to Gilak, "there was no proof that she possessed any relevant knowledge regarding the securities laws." Doc #229 at 19. To the extent Gilak believes she cannot be convicted for participating in a scheme to commit securities fraud unless she knew the scheme violated the securities laws, she is mistaken. Although 15 USC § 78ff(a) requires that a defendant know that her conduct was wrongful, it "does not require that the actor know specifically that the conduct was unlawful." United States v Tarallo, 380 F3d 1174, 1188 (9th Cir 2004).**

**The thrust of Gilak's argument is somewhat different. Gilak appears to argue that if she had no knowledge of the workings of Rule 144, she would have had no cause to question the propriety of transacting in free-trading shares held by nominees within her control and therefore could not have appreciated that the nominees masked her control over the free-trading stock in a manner likely to deceive the market. Gilak's argument, although ably crafted, fails to persuade given the wealth of circumstantial evidence from which it would have been quite reasonable for the jury to conclude that Gilak understood that her ability to transact in the relevant securities for her own account was limited and that the use of nominees surreptitiously circumvented those limitations so that**

**Gilak (along with Kelly and Eck) could control the majority of outstanding freely tradeable stock.**

**Specifically, there was substantial evidence that Gilak, either directly or indirectly, established or controlled several nominee entities to which free-trading stock was distributed, including Global Capital Concepts, Silverado Investments, Estate Funding, Ninamir Funding, Realtec Ltd, Prosper Ltd and the Neuman Company. There was also evidence that Gilak established numerous brokerage accounts in the name of nominees, thereby adding another level of complexity. See, e g, GX 87E, 410-11, 470-71; Doc #240 (Tr (Vol 4 excerpt)) at 18:8-19:9 (Cacchione). Dispersing holdings and trading activity among brokerage accounts minimized the potential for questions from brokers regarding the status of herself or nominees as control persons or affiliates of the public companies —— questions that, when asked, caused Gilak to become "irritated" and defensive. Doc #238 (Tr (Vol 6 excerpt)) at 29:2-32:17 (Green-Corradetti). And, in the case of DGBI, there was evidence that Gilak was responsible for determining which nominee entities would receive free-trading shares following the reverse merger. GX 458.**

**Under these circumstances, Scott Kelly's testimony that Gilak was privy to discussions regarding the purpose of using nominee entities merely gilds the lily.**

**In addition to evidence that Gilak understood she was concealing her control over nominees, there was also evidence that Gilak knew she was exercising that control in a manner designed to inflate the stock price. One telling example was a fax from Kelly to Gilak asking whether she had transferred (through the Depository**

Trust Company, referred to at trial as "DTC") shares of DGBI to a stock promotion firm: "I know we have been busy but have you taken care of this DTC? These guys should move a lot of stock, raising all of us some much needed money." GX 292 at 22. See also GX 162B, 174B, 291; Tr (Vol 3 excerpt) 152:23-161:4.

In sum, the jury could have reasonably concluded beyond a reasonable doubt that Gilak understood the fraudulent nature of her actions.

## IV

## *Rule 33 Motion*

### A

Gilak's primary argument for a new trial is that a fatal variance and/or constructive amendment of the indictment occurred such that she might have been convicted on a theory different from the indictment.

#### 1

The Grand Jury Clause of the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Consistent with this protection, "the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself." United States v Adamson, 291 F3d 606, 614 (9th Cir 2002). "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the

grand jury has last passed upon them." United States v Van Stoll, 726 F2d 584, 586 (9th Cir 1984). "A variance, on the other hand, occurs when the evidence offered at trial proves facts materially different from those alleged in the indictment." Adamson, 291 F3d at 614 (quotations and alterations omitted). A verdict cannot stand if there has been a constructive amendment; a variance requires that a conviction be set aside only if it prejudices the defendant's substantial rights. See United States v Olson, 925 F2d 1170, 1175 (9th Cir 1991).

A variance may occur when either the evidence or the jury instructions (or both) differ from the indictment. When the indictment and the evidence presented at trial represent two distinct sets of facts, the second of which could not be anticipated by the defendant, the variance amounts to an impermissible constructive amendment. United States v Choy, 309 F3d 602, 607 (9th Cir 2002). Similarly, a fatal variance occurs when "the difference between the indictment and the jury instructions allowed the defendant to be convicted on the basis of different behavior than that alleged in the original indictment." United State v Garcia-Paz, 282 F3d 1212, 1216 (9th Cir 2002). On the other hand, a conviction can stand "despite variance between the jury instructions and the indictment, so long as the variation in the jury instructions does not alter the behavior for which the defendant can be convicted." Id.

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Gilak advances three reasons why the evidence varied from the scheme alleged in the indictment. First, she insists there was insufficient evidence of the scheme alleged in the indictment. Next, she contends that the jury was presented with other bases upon which to convict, including violations of Rule 144 and failure to file certain forms with the SEC. Finally, she claims that the potential for a conviction based on uncharged conduct was exacerbated by the jury instructions.

The court has already concluded in the context of Gilak's Rule 29 motion that the evidence of Gilak's participation in the scheme alleged in the indictment was sufficient to sustain the verdict. Further, evidence regarding the operation of Rule 144 and the fact that certain entities controlled by Gilak failed to file Forms 3, 4 or 5 was probative of concealment, and the court stands by its earlier rulings that these items were admissible. The only real question, then, is whether the jury instructions adequately protected against the risk that the jury would find Gilak guilty based on conduct not alleged in the indictment.

Although the court's description of the alleged scheme was admittedly more abbreviated than the pertinent allegations in the indictment, the instructions tracked the steps and conduct of the scheme as alleged in the indictment. Gilak contends that the court's description of the alleged scheme was too "general" and "elastic," thereby permitting the jury to adapt the scheme to the evidence presented at trial. Doc #229 at 23. Yet in terms of specific points of divergence that could have created any wiggle-room for the jury, the best Gilak can muster is that the court

**instructed the jury that the indictment alleged that Gilak "'engag[ed] in a so-called "pump and dump" scheme.'" Id (quoting Final Jury Instructions at 12) (emphasis added). Because one dictionary defines "so-called" as "'commonly called, often incorrectly,'" Gilak posits that what would otherwise appear to be innocuous phraseology in fact broadened the description to include any scheme "commonly called" a pump and dump scheme. Id (quoting Oxford Desk Dictionary, American Edition (1995)).**

**Despite her proclamation to the contrary, Gilak's argument is "a mere hypertechnical quibble," id, for the court's instruction did not leave room for the jury to convict on the basis of any scheme "commonly called" a pump and dump scheme, any version of the paradigmatic "classic" pump and dump scheme or any other manifestation of any other fuzzily defined scheme. Rather, the court instructed the jury that the indictment alleged Gilak engaged in a "particular" scheme to defraud and that the jury could not find Gilak guilty of securities fraud unless the government proved beyond a reasonable doubt that**

> **defendant and others gained control over most of the outstanding shares of [MAWI, VLDC and DGBI] through so-called 'reverse mergers,' concealed that control, generated artificial investor demand for that stock by engaging in misleading promotional efforts and orchestrating trading activity in nominee brokerage accounts and then arranged to sell their shares to the investing public.**

**Final Jury Instructions at 12.**

**Gilak contends that the problem was compounded by the court's instruction on aiding and abetting securities fraud because that instruction did not specifically refer to the scheme alleged in the indictment or the scheme described by the court in the**

context of principal liability. The court's instruction essentially tracked the Ninth Circuit model instruction. Gilak concedes that she did not timely object to the standard formulation of aiding and abetting and the court finds no plain error. The jury was instructed that it could not find Gilak guilty as an aider and abettor unless "[s]ecurities fraud was committed by someone." Id at 13. The jury surely understood that the court was referring to the earlier instruction on principal liability, which incorporated the description of the scheme alleged in the indictment. Under these circumstances, the court has no reason to suspect that the jury might have returned a guilty verdict without finding that Gilak aided and abetted the particular scheme alleged in the indictment.

Finally, the court instructed the jury that evidence of Gilak's failures to file SEC Forms 3, 4 and 5 were not an independent basis for conviction and that such evidence could only be considered inasmuch as it related to the charges in the indictment. Final Jury Instructions at 5. As noted, these charges were spelled out in the instructions.

B

Next, Gilak argues that the court erred in refusing to give a specific unanimity instruction of the type prescribed in United States v Mastelloto, 717 F2d 1238 (9th Cir 1983).

"Ordinarily, a general unanimity instruction is sufficient to instruct the jury that its verdict must be unanimous as to each element of an offense. A specific unanimity instruction is only required where there is a possibility of juror confusion or

when a conviction may result from different jurors concluding that the defendant committed different acts." United States v Gonzalez-Torres, 309 F3d 594, 600-01 (9th Cir 2002) (citations and quotations omitted). Such a situation arises "where the complex nature of the evidence, a discrepancy between the evidence and the indictment, or some other particular factor creates a genuine possibility of juror confusion." United States v Frazin, 780 F2d 1461, 1468 (9th Cir 1986).

It is not clear that the circumstances necessitated a specific unanimity instruction. According to Gilak, "[a] variety of schemes could have been assembled from the evidence adduced at trial." Doc #229 at 25. Yet she fails to describe (and the court has not been able to concoct for itself) any alternative scheme that is both supported by the evidence and encompassed by the court's instruction describing the "particular" scheme to defraud alleged in the indictment. The only alternative scheme suggested by Gilak is that Scott Kelly had nothing but legitimate, long-term interests in MAWI, VLDC and DGBI. Regardless whether the evidence might have supported that hypothesis as an explanation for Scott Kelly's conduct, the court perceives zero risk that the jury might have forced that square peg into the round hole described by the court's instructions —— which simply begs the question whether the court's description of the "particular" scheme to defraud alleged in the indictment performed the function of a specific unanimity instruction.

In the absence of any colorable suggestion that the evidence supported a finding that Gilak, either as a principal or an aider or abettor, engaged in some scheme that was both different

from the indictment and consistent with the court's instructions, the court cannot conclude that a specific unanimity instruction deprived Gilak of her right to a unanimous verdict.

C

Gilak further asserts that she was denied a fair trial due to the court's error in allowing (1) the testimony of Brian Huchro, (2) evidence that Gilak made a payment of $250,000 on Eck's behalf as restitution in connection with his conviction in unrelated criminal proceedings and (3) evidence of certain expenditures by Gilak.

1

Mr Huchro, an accountant employed the SEC, testified regarding SEC Forms 3, 4 and 5. After generally describing the information called for by these forms, Mr Huchro testified that he had reviewed SEC records and determined that certain of the nominee entities involved in the case had not filed the forms. Gilak argues that (1) the government did not timely disclose its intention to call Mr Huchro as a witness or the substance of his testimony and (2) Mr Huchro's testimony was unduly prejudicial in that it provided the jury with an improper basis for conviction.

a

The government disclosed Mr Huchro as an expert witness on January 23, 2006. See Doc #183. On February 2, 2006, the government informed Gilak that one subject of Mr Huchro's testimony could be "the public filings (e g, Forms 8-K, 10-K, 3, 4, 5, and

144) made or not made by entities and persons involved in this action and explain the nature of those filings." Doc #193 at 2. The record does not indicate that Gilak objected to Mr Huchro's testimony before he took the stand. Rather, Gilak objected when Mr Huchro testified that he had searched public records just a few days before his testimony. In response to the court's request for briefing, the government explained that in response to an earlier request for records, the SEC had not certified the non-existence of records. Thus, Mr Huchro's last-minute research simply confirmed the non-existence of those records. Doc #236 at 2.

No doubt these events were not a model for timely disclosure by the government. But Gilak does not point to any specific prejudice resulting from the timing of the government's witness disclosures or the confirmatory research conducted by Mr Huchro before taking the stand. Telling in this regard is her assertion that "[h]ad defense counsel been afforded the timely disclosure mandated by [FRCrP 16(a)(1)(G)], he could have mounted a more forceful opposition both to the admission of Huchro's testimony, and its substance, <u>if necessary</u>." Doc #229 at 26 (emphasis added). She did not avail herself of an opportunity to re-call Mr Huchro for further examination, which suggests that nothing more was necessary than the cross-examination she had already conducted. And given the straightforward nature of Mr Huchro's testimony, Gilak's claim that she was denied a meaningful opportunity to test Mr Huchro's testimony rings hollow.

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**b**

**Gilak next contends that Mr Huchro's testimony was prejudicial insofar as it gave the jury an improper basis upon which to convict, namely, her failure to file Forms 3, 4 and 5 on behalf of entities within her control. As already explained, (1) this evidence was relevant and (2) the court specifically instructed the jury that Gilak's failure to file Forms 3, 4 and 5 was not an independent basis for conviction. Against this backdrop and the court's description of the particular scheme alleged in the indictment, the court sees no undue prejudice.**

**2**

**In 1999, Eck was convicted of wire fraud in federal court in Kentucky. The government introduced evidence that Gilak, on Eck's behalf, made a restitutionary payment of $250,000 from one of the nominees under her control. The government also introduced a letter from Gilak in her capacity as an officer of GCC requesting leniency so that Eck might be able to continue rendering services to GCC. GX 317. Gilak contends the evidence was unduly prejudicial due to the potential for guilt by association with Eck and the appearance that Gilak manipulated the justice system.**

**One basis for admitting this evidence disappeared when the court dismissed count 8 (the money laundering count that was predicated on the $250,000 payment). But the evidence still tended to show Gilak's control over GCC and was therefore probative for purposes of count 2. See Indictment ¶¶11-12. Although other evidence was probative of Gilak's control over GCC, the letter to the sentencing judge demonstrated not only that she was nominally**

in control but that she exercised actual control over GCC. The court cannot say that this evidence was needlessly cumulative given the persistence with which Gilak disputed her control over nominee entities.

3

The government also introduced evidence of jewelry and other purchases made by Gilak in connection with the money laundering counts that were eventually dismissed. The government contends that this evidence was also relevant to the securities fraud charges in that it was probative of Gilak's control over the nominees and stock proceeds, see Indictment ¶11, and participation in the overall scheme. The court doubts that the spending evidence would have been admissible in the absence of the dismissed money laundering counts. But the court nonetheless concludes that the spending evidence did not contaminate the trial proceedings for two reasons.

First, this evidence was limited in quantity. Gayle Stowell, formerly a saleswoman at Nordstrom department store in Sacramento, testified for, at most, a few minutes before the court granted Gilak's motion to strike Stowell's testimony on the ground that it was irrelevant to the money laundering charges. See Doc #241 (Tr (Vol 7 excerpt)) at 9:22-13:19, 17:18. The testimony of Sara Beth Koethe, a saleswoman at Patina Jewelers (the recipient of the funds that formed the basis for the charge of money laundering alleged in count 30, which was later dismissed) was also short in duration. See Doc #242 (Tr (Vol 8 excerpt)) at 3:24-9:2. Further, the court cut off the testimony of Special Agent Jeff Chisholm once

it became apparent that the summary exhibits that formed the basis of his testimony referenced jewelry purchases that were not directly related to the money laundering charges. See Doc #239 (Tr (Vol 9 excerpt)) at 3:9-11.

Second, the court specifically instructed the jury to disregard the testimony of Ms Stowell. See Tr (Vol 7 excerpt) at 20:8-16. Similarly, following the court's interruption of Special Agent Chisholm's testimony and the dismissal of counts 3 through 45, the court informed the jury that "the matters about which [Special Agent Chisholm] was testifying are not matters that need be submitted to you for a decision, and so it is no longer necessary for him to continue his testimony." Doc #243 (Tr (Vol 10 excerpt)) at 2:10-17. Gilak acceded to this instruction.

Under these circumstances, the court cannot conclude that the evidence of Gilak's spending habits deprived her of a fair trial.

V

In sum, Gilak's motion for judgment of acquittal is DENIED. Gilak's motion for a new trial is likewise DENIED.

SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge